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No. 92-1272

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JIT KIM LIM, M.D., *Petitioner,*

v.

CENTRAL DUPAGE HOSPITAL, HEALTHCORP AFFILIATES, DAVID FOX, GEORGE HOLZHAUER, WENDELL FINKBEINER, PETER BRUSCA, M.D., RAYMOND DIETER, M.D., DAVID BARRETT, M.D., MUHAMMAD SHARIF, M.D., ROBERT WILSON, M.D., ANGELO SORCE, M.D., DONALD WHITE, M.D., WILLIAM PETRANDO, M.D., JEFFREY JOHNSON, M.D., DENNIS BAKER, M.D., JAMES O'BRIEN, M.D., VINCENT SACKETT, M.D., RENATO IMANA, M.D., HARB BOURY, M.D., DOUGLAS B. MAINS, M.D., RONALD M. SEVERINO, M.D., J. GEORGE HANDLEY, M.D., RICHARD NIEDBALLA, M.D., RICHARD MEYER, M.D., NEIL AGRUSS, M.D., RICHARD DOMINGUEZ, M.D., JAMES GRISSOM, M.D., DONALD GUSTAFSON, M.D., JOHN A. HEITZLER, M.D., MONA KEA SOUTH ENTERPRISES, INC., MONA KEA LEASING ASSOCIATION, MONA KEA OWNERS ASSOCIATION, and MONA KEA SOUTH PROFESSIONAL CONDOMINIUM ASSOCIATION, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE CENTRAL DUPAGE RESPONDENTS* IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Seventh Circuit correctly ruled that principles of *res judicata* barred plaintiff's second attempt to litigate the same claim notwithstanding the excuses plaintiff advanced for voluntarily abandoning his claim in the first proceeding.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW ...	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
REASONS FOR DENYING THE WRIT	1
THE SEVENTH CIRCUIT'S UNANIMOUS DECISION, AFFIRMING DISMISSAL ON *RES JUDICATA* GROUNDS OF PETITIONER'S SECOND ATTEMPT TO LITIGATE AN ANTITRUST CLAIM, IS BASED ON THE SOUND APPLICATION OF SETTLED LAW AND PRESENTS NO ISSUE MERITING FURTHER REVIEW BY THIS COURT	1
Introduction	1
A. Petitioner Asserted, Then Abandoned, His Antitrust Claim In The First Proceeding	2
B. Petitioner Asserted, Then Abandoned, His Antitrust Claim In A Rule 60(b) Proceeding	3
C. Petitioner Alone Is Responsible For His Failure To Avail Himself Of Procedural Opportunities To Litigate His Claim ...	5
D. Neither The District Court Nor The Seventh Circuit "Ignored" Any Material Facts	6
CONCLUSION	8

TABLE OF AUTHORITIES

	PAGE
Asher v. Harrington, 461 F.2d 890 (7th Cir. 1972) ..	3
Bownes v. City of Gary, Indiana, 112 F.R.D. 424 (N.D. Ind. 1986)	3
Cohen v. Illinois Institute of Technology, 581 F.2d 658 (7th Cir. 1978), *cert. denied*, 439 U.S. 1135, 99 S. Ct. 1058 (1979)	3
Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 101 S. Ct. 2424 (1981)	1, 5, 6
Jones v. City of Alton, 757 F.2d 878 (7th Cir. 1985)	5
Kremer v. Chemical Construction Corp., 456 U.S. 461, 102 S. Ct. 1883 (1982)	5
Lim v. Central DuPage Hospital, 871 F.2d 644 (7th Cir. 1989) (*Lim I*)	2
Lim v. Central DuPage Hospital, 972 F.2d 758 (7th Cir. 1992) (*Lim II*)	*passim*
Patrick v. Burget, 486 U.S. 94, 108 S. Ct. 1658 (1988)	2

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Introduction

It is well established that a final judgment on the merits precludes subsequent litigation of issues which were or could have been raised in a prior suit involving the same transaction. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S. Ct. 2424, 2428 (1981). Petitioner does not dispute this settled principle and, as his own recitation of facts demonstrates, prior to filing the instant action he pursued two prior proceedings involving the same transaction, followed by two appeals. Those prior proceedings afforded petitioner ample procedural opportunities to present the antitrust claim asserted in this action.

Petitioner, however, *voluntarily* abandoned each of these prior opportunities. His continuing unwillingness to accept his own responsibility for the outcome of this latest proceeding, finally dismissing his claim on *res judicata* grounds, raises no important or unsettled question of law, and demonstrates no conflict among Courts of Appeal meriting further review by this Court. Rather, as the Seventh Circuit explained in affirming dismissal of petitioner's complaint:

> At some point, there must be an end to litigation, and barring the appellant's second suit on the ground of *res judicata* is an equitable method of upholding that policy. As the district court noted, "[t]he plaintiff has filed two cases, five separate complaints, two appeals [now three], and numerous motions to reconsider

> and/or vacate. At some point it is unfair to require the defendants to repeatedly renew their defense in a case which they reasonably believed to be closed against them." Dr. Lim's inability to litigate his antitrust claim is the result not of a deprivation of available process, but his counsel's failure to follow through with the full and fair opportunity that was available to him.

Lim v. Central DuPage Hospital, 972 F.2d 758, 764 (7th Cir. 1992). (*Lim II*) In short, petitioner's complaint that application of *res judicata* principles was not warranted under the facts of this case is contrary to the record.

A. Petitioner Asserted, Then Abandoned, His Antitrust Claim In The First Proceeding.

In August, 1986, petitioner filed a single count complaint alleging that the revocation of his staff privileges at Central DuPage Hospital violated Federal antitrust laws. *Lim II*, 972 F.2d at 760. Then, although no court had ever held that Illinois' peer review system involved sufficient state action to warrant exemption from the antitrust laws, petitioner decided that he would not prevail on this issue and voluntarily withdrew his antitrust claim. (Pet. App. I, p. 9)

Petitioner replaced the antitrust claim with an allegation that revocation of his privileges was motivated by race discrimination. When this claim was dismissed on the merits, petitioner appealed. *Lim v. Central DuPage Hospital*, 871 F.2d 644 (7th Cir. 1989). (*Lim I*) While that appeal was pending, petitioner had second thoughts about having abandoned his antitrust claim and, on the eve of oral argument, moved for leave to cite this Court's decision in *Patrick v. Burget*, 486 U.S. 94, 108 S. Ct. 1658 (1988), as additional authority requiring remand. (Pet. App. C, pp. 6-9)

Petitioner never pressed for a ruling on this motion, however, never filed a motion for leave to file an amended complaint, and never tendered an amended complaint as he should have to properly raise and preserve the issue. *See Cohen v. Illinois Institute of Technology*, 581 F.2d 658 (7th Cir. 1978), *cert. denied*, 439 U.S. 1135, 99 S. Ct. 1058 (1979); *Asher v. Harrington*, 461 F.2d 890 (7th Cir. 1972); *Bownes v. City of Gary, Indiana*, 112 F.R.D. 424 (N.D. Ind. 1986). After the Seventh Circuit affirmed dismissal of his race discrimination claim in *Lim I*, petitioner did not raise the issue in his petition for rehearing or seek review in this Court. As the Seventh Circuit explained in *Lim II*:

> Dr. Lim filed a request for remand four days before oral argument on his appeal, but he failed to respond to the defendants' arguments against remand, he failed to raise the issue during oral argument, and he failed to object to our sub silentio rejection of his request for remand in our opinion when he requested rehearing of his appeal.

Lim II, 972 F.2d at 763.

Petitioner's belated attempt to seek this Court's review of the Seventh Circuit's ruling on his motion for remand in the 1989 appeal (Petition, pp. 21-23) comes four years too late.

B. Petitioner Asserted, Then Abandoned, His Antitrust Claim In A Rule 60(b) Proceeding.

Petitioner invoked a second procedural opportunity to assert his antitrust claim when, seven months after the Seventh Circuit affirmed dismissal of his initial complaint, petitioner filed a motion for relief from judgment pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. That motion asked the District Court to vacate the prior

dismissal, based on *Patrick*, and allow petitioner to file an amended complaint to assert the previously abandoned antitrust claim. *Lim II*, 972 F.2d at 761. The District Court denied the motion on two grounds:

> a) "the law is clear that a mere change in law, no matter how dramatic, is insufficient on its own to warrant vacating a final judgment [i.e., to constitute 'extraordinary circumstance']" and b) the plaintiff failed to pursue all possible opportunities to request a remand to amend his complaint to include the antitrust claims while his appeal was pending.

Lim II, 972 F.2d at 761.

Petitioner filed a notice of appeal from this ruling, but never filed an appellate brief. When the Seventh Circuit issued a rule to show cause why the appeal should not be dismissed, petitioner did not respond. Accordingly, petitioner's appeal was dismissed for want of prosecution. *Lim II*, 972 F.2d at 761.

Petitioner offers this Court a bizarre argument why this abandoned proceeding should not "count" for *res judicata* purposes—he did not appeal because he believed that the Seventh Circuit would rule against him (Petition, pp. 23-24), just as he abandoned his antitrust claim in the first place because he thought that the courts would rule against him. Thus, petitioner's argument comes down to the proposition that the *res judicata* doctrine is inapplicable to this Section 60(b) proceeding, not because the District Court was wrong, but because its ruling was correct and would have been affirmed.

Petitioner cites no authority for such a *non sequitur*, nor does any exist. To the contrary, it is established that an adverse decision is no less final and preclusive for *res judicata* purposes when a litigant makes a conscious, tac-

tical decision not to pursue an appeal. *See Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S. Ct. 2424 (1981).

C. Petitioner Alone Is Responsible For His Failure To Avail Himself Of Procedural Opportunities To Litigate His Claim.

The requirement that, for *res judicata* purposes, a party must have had a full and fair opportunity to litigate an issue relates to the *procedural* opportunity rather than obtaining a judicial determination on the merits of the issue. *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481, 102 S. Ct. 1883, 1897-98 (1982).[1] Petitioner had the procedural opportunity to assert his antitrust claim in the 1986 suit, but he voluntarily abandoned the claim. He had procedural opportunities to seek to reinstate that claim, either through a proper motion for leave to amend while the case was pending on appeal; through the Rule 60(b) proceeding he instituted in 1989; or through pursuing an appeal from either of those adverse rulings. He abandoned these proceedings as well. As the Seventh Circuit stated:

> [j]ust as abandonment of claims was the motif of Dr. Lim's first appeal, see *Lim*, 871 F.2d at 646, failure to follow through with the procedures he initiated is the motif of this third appeal. The plaintiff received a

[1] Petitioner's reliance on *Jones v. City of Alton*, 757 F.2d 878 (7th Cir. 1985), as establishing a different rule is misplaced. In *Jones*, the prior state court proceeding asserted as a bar to the plaintiff's Federal claims provided no procedural mechanism for asserting those claims in conjunction with his state law claims. The Federal law applicable to this case, however, not only permits but requires that all claims arising from the same transaction be brought in a single suit.

> full and fair opportunity to litigate his antitrust claim, but he neglected to prosecute the same in a lawyer-like timely and efficient manner.

Lim II, 972 F.2d at 764.

Petitioner's own analysis that he would lose on the merits if he pursued his claim does not equate with lack of opportunity to litigate. Nor does petitioner's hindsight remorse regarding his prior litigation choices exempt him from application of the principles of *res judicata*, or raise any issue meriting this Court's consideration.

D. Neither The District Court Nor The Seventh Circuit "Ignored" Any Material Facts.

Petitioner's additional argument that the courts below "unfairly" ignored or misstated facts, made without citation to any authority, is contrary to the record and presents no grounds for further review by this Court.

Petitioner complains that neither the District Court nor the Seventh Circuit mentioned that an antitrust claim similar to petitioner's was filed as a separate suit by a separate plaintiff. However, this fact has no relevance at all to the question of whether petitioner's claim is barred by *res judicata*. *See Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S. Ct. 2424 (1981) (fact that other litigants were able to proceed on their antitrust claim arising from same facts did not preclude application of *res judicata* where plaintiffs failed to appeal prior adverse ruling).

Petitioner also asserts that the District Court's order of December 5, 1990, granting respondents' motion to dismiss on *res judicata* grounds, "fails to acknowledge" his efforts to seek remandment during the pendency of his

first appeal. Petitioner neglects to point out, however, that these purported efforts were thoroughly discussed in the District Court's subsequent memorandum opinion denying petitioner's motion for reconsideration (Pet. App. I, p. 10), and in the Seventh Circuit's opinion, *Lim II*, 972 F.2d at 761.

Finally, petitioner objects to the Seventh Circuit's statement that he failed to timely respond to the motion to dismiss. This statement accurately reflects the record. Respondents moved to dismiss petitioner's original complaint and petitioner responded, but these pleadings were rendered moot when petitioner was granted leave to file an amended complaint. *Lim II*, 972 F.2d at 762. Respondents then moved to dismiss the amended complaint, but petitioner did not respond to this motion in any way, despite numerous extensions of time to do so. His first response came in a motion for reconsideration filed over four months after the District Court had ruled on the motion. *Lim II*, 972 F.2d at 762-763. More importantly, however, the untimeliness of petitioner's response was not the basis for either the District Court's or the Seventh Circuit's ruling.

In sum, petitioner's complaints are without merit and have no bearing on the question of whether petitioner's voluntary abandonment of his antitrust claim in the prior action and failure to follow through with prior procedural opportunities to reinstate that claim barred this second suit.

CONCLUSION

Petitioner's second suit seeking to litigate a claim that he had a full and fair opportunity to litigate in prior proceedings was plainly barred by *res judicata*, as the District Court and the Court of Appeals properly ruled. That decision is soundly based on well-established law and gives rise to no issue meriting review by this Court. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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